

# Guaranteeing the ECB's democratic accountability in the post-Banking Union era: An ever more difficult task?

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# Guaranteeing the ECB's democratic accountability in the post-Banking Union era: An ever more difficult task?

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**Diane Fromage\***

## Abstract

Following the Great Financial Crisis, the European Central Bank's functions have been significantly altered. It is now involved in the functioning of a variety of European Union bodies and agencies, new powers in the field of banking supervision have been attributed to it and it has resorted to unconventional monetary policy. Such a concentration of powers arguably gives rise to issues of accountability and institutional balance within the European Union: (i) the resulting institutional framework is particularly complex and difficult to understand; (ii) the numerous functions the European Central Bank assumes makes it increasingly difficult to identify in which arena(s) it should be held to account for which action; and (iii) its role in the different bodies or agencies may vary in theory and in practice, which, in turn, influences the degree to which the European Central Bank should be held to account. This article aims at showing to what extent the European Central Bank's role has multiplied and diversified with a view to assess how it is held to account in those different instances, and what the consequences are for the European Central Bank's democratic accountability, primarily towards the European Parliament, as well as towards the Council of the European Union and national parliaments where applicable.

## Keywords

European Central Bank, European Parliament, national parliaments, Council of the EU, banking union, Single Supervisory Mechanism, European Banking Authority, European System of Financial Supervision, European Systemic Risk Board

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## Introduction

As mentioned in the introduction to this special issue, numerous changes have intervened in the European Union's (EU's) role in the financial and banking domains following the Great Financial Crisis (GFC). Among other things, these reforms have significantly affected the European Central Bank (ECB) because it has now received competences in banking supervision and it is also involved in a series of new bodies and EU agencies. The creation of the new European System of Financial Supervision (EFSF) with, among others, the introduction of the European Systemic Risk Board (ESRB) started first in 2010 but it soon appeared that these solutions were insufficient and that steps towards a Banking Union (BU) had to be taken.<sup>1</sup> The creation of the BU was meant to empower the EU to act in three domains that form its pillars: *Supervision* (Single Supervisory Mechanism, SSM), *Resolution* (Single Resolution Mechanism) and *Deposit Guarantee* (European Deposit Insurance Scheme, not yet completed).

Consequently, a new agency was created (Single Resolution Board, SRB), and new competences were conferred upon the ECB: since 2014, it has assumed (new) microprudential and macroprudential supervisory tasks. Its President continues to chair the ESRB. Furthermore, the ECB has an observer status in the SRB and sits, in its supervisory capacity, on the European Banking Authority's (EBA) Board of Supervisors with no voting rights. The ECB has also played a key role in managing the crisis by taking part in the Troika alongside the European Commission (Commission) and the International Monetary Fund.<sup>2</sup> The ECB's competences and functions have hence been radically increased, both *de iure* and *de facto*, as the bank has also been led to stretch its mandate in the monetary domain by resorting to unconventional monetary policies (such as Outright Monetary Transactions and Asset Purchase Programmes).<sup>3</sup>

Such concentration of powers visible in the numerous 'hats' the ECB now wears arguably gives rise to issues of accountability and institutional balance within the EU.<sup>4</sup> This is due to three main reasons: (i) the resulting institutional framework is particularly complex and difficult to understand; (ii) the numerous functions the ECB assumes makes it increasingly difficult to identify in which arena(s) it should be held to account for which action; and (iii) its role in the different bodies or agencies may vary in theory and in practice, which, in turn, influences the degree to which the ECB should be held to account.<sup>5</sup>

Against this background, this article aims at showing to what extent the ECB's role has multiplied and diversified with a view to assess how it is held to account in those different instances, and what the consequences are for the ECB's democratic accountability, primarily towards the

1. European Council, 'European Council 18/19 October 2012 Conclusions', *European Council* (2012), [https://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/ec/133004.pdf](https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/133004.pdf).

2. See P. Dermine, 'Out of the comfort zone? The ECB, financial assistance, independence and accountability', 26 *Maastricht Journal of European and Comparative Law* (2019), in this special issue.

3. This has led to several judicial challenges at both national and EU level, most famously in the framework of the OMT/Gauweiler case. Case C-62/14 *Peter Gauweiler and Others v. Deutscher Bundestag and BVerfG*, EU:C:2015:400; (DE) Judgment of the Second Senate of 21 June 2016 – 2 BvR 2728/13. See further on the ECB's unconventional monetary policies: A.-L. Högenauer and D. Howarth, 'The Democratic Deficit and European Central Bank Crisis Monetary Policies', 26 *Maastricht Journal of European and Comparative Law* (2019), as well as K. Tuori, 'The ECB's quantitative easing programme as a constitutional game changer', 26 *Maastricht Journal of European and Comparative Law* (2019), in this special issue.

4. Czech report in G. Bándi. et al., *European Banking Union* (Wolters Kluwer, 2016).

5. This is, for instance, the case in the EBA as detailed below.

European Parliament (EP), as well as towards the Council of the EU (Council) and national parliaments where applicable. By contrast, the question of the renewed institutional balance post-crisis remains out of the scope of this article. Additionally, the focus of this article lies in the ECB's participation in permanent, formal bodies and institutions; hence, the ECB's participation in the Troika is not contended in this analysis. Furthermore, the ECB's involvement in the SRB is not considered here either as it only participates as an observer.

Before delving into these questions, a few remarks on the ECB's and the EU's democratic accountability generally are in order. Democratic accountability within the EU has been defined in article 10 Treaty of the EU (TEU) since the entry into force of the Lisbon Treaty. This article establishes that both the directly elected EP and the Council, whose members are themselves accountable to their national parliaments or to their people, are in charge of guaranteeing democracy. It follows that the EP, in particular in its quality as sole directly elected EU institution, bears a special responsibility to ensure democratic accountability and legitimacy, especially in those areas in which the EU has been attributed exclusive competences, such as monetary policy. Furthermore, the EP plays a special role in as far as EU institutions should, in principle, be held accountable by other EU institutions whereas national institutions are to be controlled by national institutions.<sup>6</sup> At the same time, however, national parliaments may be called to play a (direct) role vis-à-vis the ECB as well, and in fact the new SSM Regulation establishes direct relationships between the ECB and national parliaments as detailed below. In the area of banking supervision, their involvement is justified for several reasons. First, the SSM is a mechanism in whose framework both national and European institutions are called to intervene and cooperate because the ECB only supervises Significant Institutions directly; Less Significant Institutions continue to be supervised by National Competent Authorities (NCAs) under the ultimate watch of the ECB.<sup>7</sup> Second, the consequences of the ECB's supervisory decisions may have a strong impact on Member States and their economy thereby justifying national parliamentary oversight.<sup>8</sup> Third, those competences had been exercised at Member State level until the establishment of the Banking Union, and (some) national parliaments had close ties to their NCAs.<sup>9</sup> In the area of monetary policy, national parliaments' involvement has not been foreseen formally. Yet, in this field too their role is arguably justified in light of the consequences the ECB's decisions and actions in form of conventional and unconventional monetary policies have on Member States' financial stability.<sup>10</sup>

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6. C. Zilioli, 'The independence of the European Central Bank and its new banking supervisory competences', in D. Rittleng (ed.) *Independence and legitimacy in the institutional system of the European Union* (Oxford University Press, 2016), p. 176.

7. The distinction in the degree of involvement of the ECB and its consequences for the level of accountability to be ensured remains out of the scope of this article.

8. Recital 56 of the Preamble to Council Regulation No. 1024/2013/EU of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, [2013] OJ L 287/63 (the SSM Regulation). G. Ter Kuile, L. Wissink and W. Bovenschein, 'Tailor-made accountability within the Single Supervisory Mechanism', 171 *Common Market Law Review* (2015), p. 155–190.

9. This was, for instance, the case of the French national parliament. C. Caresche, M. Herbillon and D. Quantim, 'Assemblée nationale, Rapport d'information n° 1665 déposé par la Commission des Affaires européennes sur les progrès de l'union bancaire et de l'intégration économique au sein de l'Union économique et monétaire', *Assemblée nationale* (2013), <http://www.assemblee-nationale.fr/14/europe/rap-info/i1665.asp>, p. 17.

10. These visits to the national parliaments have, however, been found to undermine the relationship to the EP and have been criticized on that ground. T. Tesche, 'The ECB and national parliaments: Just a publicity stunt?', *Positive Money Europe* (2018), <https://www.positivemoney.eu/2018/09/ecb-national-parliaments-publicity-stunt/>.

This article is organized as follows. It first presents the different roles assumed by the ECB as well as the democratic accountability mechanisms in place in relation to each of them (Section 2). An evaluation of those mechanisms and a discussion on the different democratic accountability standards follows (Section 3). The conclusion presents an outlook (Section 4).

## The ECB's different roles

The different roles the ECB now holds, cover a range of issues and participation in several bodies, which will be examined here by order of importance of the ECB's involvement. The ECB's primary task is still the exclusive conduct of common monetary policy for the Eurozone with the objective of maintaining price stability (i). Since autumn 2014, it additionally holds the key supervisory functions for the Euro area banks (ii). It hosts the ESRB, which is also chaired by its President (iii). A representative of the supervisory side and one of the ESRB sit on the EBA's board of supervisors with no voting right (iv). In each of these instances, specific democratic accountability mechanisms have been devised that will be presented here. This first requires an understanding of the content of the tasks and then demands a description of those mechanisms.

## The ECB and its accountability in the monetary policy

The ECB was designed in the Maastricht Treaty of 1992 and established in 1998 primarily to conduct the exclusive community competence in monetary policy. Its independence, and that of the European System of Central Banks (ESCB) in general, was clearly anchored, and its objectives defined: its primary objective would be to maintain price stability, although '[w]ithout prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Community with a view to contributing to the achievement of the objectives of the Community' (Article 105 TEC).

In the case of the common monetary policy, the accountability mechanisms need to cover a broad range of issues. The ECB defines its objectives in a numeric manner and it designs and operationalizes its operational framework through which it influences financial conditions and ultimately inflationary developments. Most fundamentally, it conducts the daily monetary policy operations for the benefit of the euro area by making interest rate decisions, allocating central bank money to the banking sector and engaging to other means and instruments.

The single currency was introduced in 1999 and from then onwards, regular Monetary dialogues with the EP started to be organized with the aim to ensure the ECB's accountability in the exercise of the EU's exclusive competence in the monetary policy (Article 3(1)(c) TFEU).<sup>11</sup> The Monetary

11. On the Monetary Dialogues, see inter alia, F. Amtenbrink and K. van Duin, 'The European Central Bank before the EP: Theory and practice after ten years of monetary dialogue', 34 *European Law Review* (2009), p. 561–583; A. Belke, 'Monetary Dialogue 2009–2014: Looking backward, looking forward', 4 *Intereconomics* (2014), p. 204–210; A. Belke, 'Central Bank Communication: Managing Expectations through the Monetary Dialogue', *ROME Discussion Paper Series* (2017), <https://ideas.repec.org/p/rmn/wpaper/201704.html>, p. 17–04; G. Claey's, M. Hallberg and O. Tsche-kassin, 'European Central Bank accountability: How the monetary dialogue could evolve', *Bruegel policy contribution* No. 2014/04 (2014), <http://bruegel.org/2014/03/european-central-bank-accountability-how-the-monetary-dialogue-could-be-improved/>; S. Collignon, 'Central Bank Accountability in Times of Crisis. The Monetary Dialogue: 2009–2014', *European Parliament* (2014), [http://www.europarl.europa.eu/RegData/etudes/IDAN/2014/518753/IPO-L\\_IDA\(2014\)518753\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2014/518753/IPO-L_IDA(2014)518753_EN.pdf); K. Whelan, 'Note for the EP's Committee on Economic and Monetary Affairs, PE 507.482', *European Parliament* (2013), <http://www.europarl.europa.eu/document/activities/cont/201309/20130917ATT71507/>

dialogues now find their legal basis in Article 284(3) TFEU, which states the ECB has to submit and present the annual report on the activities of the ESCB and on the monetary policy to the EP. This report is commonly presented on the day of its publication to the ECON Committee by the ECB Vice-President. In this way, the EP has sufficient time to prepare a report in which it may include its opinion on the report before it is presented by the ECB's President in plenary.<sup>12</sup> The President of the ECB or other members of the Executive Board may also be heard by the EP's competent committee (that is the ECON Committee) at the EP's non-binding request or on their own initiative.<sup>13</sup> This notwithstanding, the EP's President appears before the ECON Committee four times per year as prescribed by the EP's rules of procedure (Article 126(3) Rules of Procedure of the European Parliament (EP RoP)). Additionally, members of the European Parliament (MEPs) may address questions to the ECB (Article 131 EP RoP). Each of them can submit a maximum of six questions per month, which the ECB must answer within six weeks; if it fails to do so, they may be addressed during the next hearing of the ECB President before the ECON Committee. Besides these procedures of accountability *ex post*, the EP has also been guaranteed certain rights *ex ante*. Its consultation is indeed required before the nomination of the members of the Executive Board (Article 293(2) TFEU). The European Council can, however, go ahead with its candidate even where the EP has expressed its opposition; the EP may require that the European Council reconsiders its decisions, but no obligation relies on it to do so (Article 122(4) EP RoP). Both the *ex ante* and the *ex post* accountability channels at the EP's disposal are thus rather soft, which can be derived from the ECB's strong independence.

In practice, these instruments have been fairly used and even more so since the GFC, even if some criticism has also been voiced, at the beginning at least.

The yearly reports are indeed presented to the EP, which subsequently adopts a resolution. These resolutions have been used by MEPs to transmit their remarks to the ECB, and they have tabled many more amendments since the outburst of the GFC than they used to in the past, showing the report has become a more useful accountability channel.<sup>14</sup> Furthermore, it is also noteworthy that these ECB yearly reports now provide the ground for a real, public, dialogue between the EP and the ECB as the ECB has started to provide its feedback on those EP resolutions since 2016.<sup>15</sup>

The Monetary dialogues have been regularly organized, even if no obligation to do so exists; these four yearly meetings are an indication of the ECB's commitment to democratic accountability, based on its willingness to participate in them. During the crisis, they have been complemented by regular ad hoc hearings (18 between 2008 and 2017).<sup>16</sup> The content of the dialogue sessions has, however, been differently assessed. Some have noted that the ECB has been 'highly responsive to the ECON'.<sup>17</sup> By contrast, others have critically highlighted that during the dialogue

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20130917ATT71507EN.pdf; S.C.W. Eijffinger and E. Mujagic, 'An Assessment of the Effectiveness of the Monetary Dialogue on the ECB's Accountability and Transparency: A Qualitative Approach', 39 *Intereconomics* (2004), p. 190–203.

12. G. Claeys, M. Hallberg and O. Tschekassin, *Bruegel policy contribution* No. 2014/04 (2014).

13. F. Amtenbrink and K. van Duin, 34 *European Law Review* (2009), p. 569.

14. N. Fraccaroli, A. Giovannini and J.-F. Jamet, 'The evolution of the ECB's accountability practices during the crisis', *ECB Economic Bulletin* No. 5/2018 (2018), [https://www.ecb.europa.eu/pub/economic-bulletin/articles/2018/html/ecb.ebart201805\\_01.en.html](https://www.ecb.europa.eu/pub/economic-bulletin/articles/2018/html/ecb.ebart201805_01.en.html), p. 60–61.

15. *Ibid.*, p. 61.

16. *Ibid.*, p. 59.

17. S.C.W. Eijffinger and E. Mujagic, 'An assessment of the effectiveness of the monetary dialogue on the ECB's accountability and transparency: A qualitative approach', 39 *Intereconomics* (2004) p. 190–203, 190.

sessions the ECB President largely repeats what he has already said at the press conferences that precede those hearings before the ECON Committee.<sup>18</sup> The media has thus not developed any particular interest for the dialogue sessions,<sup>19</sup> and the ECB monthly press conferences have in fact been found to attract the most active following by the press and financial markets.<sup>20</sup> Additionally, for a long time MEPs asked rather general economic questions instead of using this opportunity to hold the ECB to account.<sup>21</sup> This happened even though they receive briefings written by a monetary expert panel prior to each session. MEPs' task has admittedly become more complex in recent years because, as is highlighted also by this article, the ECB has been led to assume new functions and has stretched its mandate. Therefore, the smooth functioning of the Dialogue has been said to have been threatened by the crisis and the changes it has induced for the ECB, for instance because of its participation in the Troika.<sup>22</sup> The new unconventional monetary policy measures adopted by the ECB over the past years are arguably more difficult to assess and made accountable. This is problematic in the sense that the Monetary dialogue would arguably have to be reformed for functions such as that of financial market supervisor or for the resort to quantitative easing to be covered within its scope, even if, generally, the ECB's accountability framework has been found by the ECB to be resilient in the context of the GFC, allowing for adaptations without any formal amendments.<sup>23</sup>

Written questions have been frequently and increasingly resorted to by MEPs (29 questions have been answered between January and October 2018<sup>24</sup> and in 2015 alone more questions were asked than during the whole of the previous parliamentary term between 2009–2014).<sup>25</sup> Smaller parliamentary groups have sent a large number of the questions posed since 2014, which points to the use of written questions to compensate for a more limited possibility to ask questions during the dialogue sessions.<sup>26</sup> Alongside accountability, questions contribute to enhancing transparency because both questions and answers are published on the ECB's website. Nevertheless, their results are mixed as 'both the questions and the answers often leave key concepts unexplained or unaddressed, often because questions go beyond the remit of the ECB's mandate'.<sup>27</sup> However, especially the ECB's unconventional monetary policy measures are well described in the written responses.

No similar relationships exist between the ECB and the Council. For example, the ECB's annual report is not presented before the Council and no hearings are organized. Nevertheless,

18. G. Claeys, M. Hallberg and O. Tschekassin, *Bruegel policy contribution* No. 2014/04 (2014), p. 7.

19. S. Heidebrecht, 'Wie transparent ist die Europäische Zentralbank? Eine international vergleichende Betrachtung vor dem Hintergrund der weitreichenden Neuerungen zum Januar 2015', 25 *Zeitschrift für Politikwissenschaft* (2015), p. 501–525, 511.

20. G. Claeys, M. Hallberg and O. Tschekassin, *Bruegel policy contribution* No. 2014/04 (2014), p. 8.

21. *Ibid.*

22. A. Belke, 'A Monetary dialogue 2009–2014: Looking backward, looking forward', *Intereconomics* (2014), p. 204–210, 205.

23. N. Fraccaroli, A. Giovannini and J.-F. Jamet, *ECB Economic Bulletin* No. 5/2018 (2018)

24. ECB website, <http://www.ecb.europa.eu/pub/pub/intco/html/index.en.html?skey=letter>.

25. N. Fraccaroli, A. Giovannini and J.-F. Jamet, *ECB Economic Bulletin* No. 5/2018 (2018), p. 60.

26. *Ibid.*, p. 60.

27. B. Braun, 'Two sides of the same coin? Independence and accountability of the European Central Bank', *Transparency International EU* (2017), <http://transparency.eu/resource/two-sides-of-the-same-coin-independence-and-accountability-of-the-european-central-bank/>, p. 39–40.



the President of the Council and a member of the Commission may participate, without having the right to vote, in meetings of the Governing Council of the European Central Bank. The President of the Council may [also] submit a motion for deliberation to the Governing Council of the European Central Bank [, and t]he President of the European Central Bank shall be invited to participate in Council meetings when the Council is discussing matters relating to the objectives and tasks of the ESCB.<sup>28</sup>

In practice, the ECB is indeed represented at Economic and Financial Affairs Council meetings, although in 2018 for instance it was the ECB Vice-President who most often participated.<sup>29</sup>

It should also be noted that, as anticipated in the introduction, despite the absence of formal provisions in this sense some direct relationships between the ECB and the national parliaments of the Euro area Member States have been established since the outbreak of the economic and financial crisis and the consequent more active role of the ECB. The President of the ECB accepted to appear before five parliaments at the peak of the crisis (France, Finland, Germany, Italy and Spain).<sup>30</sup> However, these visits have become less frequent as only one was organized in 2016 and in 2017, respectively.<sup>31</sup> Those visits have still taken place in a reduced number of parliaments (six in total),<sup>32</sup> and all of them are the parliaments of important economically Western States, which raises the problem of the lack of formalization of these exchanges: in the absence of any formal mechanism, the ECB President could be led to pick and choose the parliaments to which they wish to appear.<sup>33</sup>

Consequently, the ECB's accountability for its action in the monetary policy is mostly assured by the EP, even if some exchanges with the Council and (some of) the national parliaments of the euro area do take place.

### *The ECB's accountability as banking supervisor*

The ECB was vested with new powers in banking supervision with the introduction of the SSM in November 2014. The ECB became the main banking supervisor in the Euro area and is directly responsible for supervising all the large banks and for the sufficient supervision of the less important banks conducted mainly by NCAs. A 'Chinese wall' is to separate monetary policy and supervisory functions.<sup>34</sup> To this end, a purposely established Supervisory Board is in practice in charge of supervision, although its decisions are formally adopted by the ECB's Governing Council. Note also that the Supervisory Board submits its decisions to the ECB Governing Council under a non-objection procedure according to which decisions are adopted unless the Governing

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28. Article 284(1) TFEU.

29. A list of participants are available on the Council of the EU's website.

30. D. Jancic, 'Accountability of the European Central Bank in a Deepening Economic and Monetary Union', in D. Jancic (ed.), *National Parliaments after the Lisbon Treaty and the Euro Crisis: Resilience or Resignation?* (Oxford University Press, 2017), p. 141–158, p. 152 et seq.

31. N. Fraccaroli, A. Giovannini and J.-F. Jamet, *ECB Economic Bulletin* No. 5/2018 (2018), note 44.

32. A visit was organized in the Netherlands in 2017.

33. D. Fromage and R. Ibrido, 'Democratic accountability and parliamentary oversight over the ECB. The Banking Union experience', *LUISS School of Governance - Working paper series* 18 (2017), <http://sog.luiss.it/sites/sog.luiss.it/files/SOG%20Working%20Papers%20WP40%20-%202017%20Fromage-Ibrido.pdf>.

34. See for a discussion of this separation and its relative character: M. Goldmann, 'United in diversity? The relationship between monetary policy and prudential supervision in the Banking Union', 14 *European Constitutional Law Review* (2018), p. 293



Council objects to them within 10 working days.<sup>35</sup> Some safeguards have been put in place to ensure that what appears to be a lengthy procedure runs smoothly.<sup>36</sup> Other solutions that would have made the Supervisory Board less dependent on the Governing Council were also envisaged, but they would have required an amendment to the ESCB Statute or would have left the Supervisory Board in a ‘non-Treaty limbo’.<sup>37</sup>

The Chair of the Supervisory Board cannot be a member of the ECB’s Governing Council, although its Vice-Chair is chosen among the members of the ECB’s Executive Board. Furthermore, four ECB representatives sit on the Supervisory Board alongside one representative of each NCA of the participating Member States. Thus, even if important safeguards have been put in place to guarantee the separation between the ECB’s monetary and supervisory functions, there is a clear intertwining between them, at least for the persons involved.<sup>38</sup>

The SSM Regulation establishes an original accountability framework:<sup>39</sup> it not only establishes relationships vis-à-vis the EP and the Council (in line with Article 10 TEU),<sup>40</sup> but it also foresees the existence of relationships with national parliaments.<sup>41</sup>

Concerning the ECB’s relationships with the EP and the Council, Article 20(1) SSM Regulation establishes that ‘[t]he ECB shall be accountable to the European Parliament and to the Council for the implementation of this Regulation’. The provisions were developed further in an interinstitutional agreement between the EP and the ECB.<sup>42</sup> Additionally, a Memorandum of Understanding was concluded between the ECB and the Council.<sup>43</sup>

It is foreseen that the EP is involved both *ex ante* and *ex post*. *Ex ante* it may veto the nomination of the Chair of the Supervisory Board.<sup>44</sup> *Ex post* it receives the SSM annual reports, which are presented to the ECON Committee that also may invite the Chair to appear before it to report on its supervisory tasks and MEPs may submit some written questions for written answers to the SSM.<sup>45</sup> Confidential oral discussions between the Chair and the Vice-Chair of the ECON Committee and the Chair of the Supervisory Board may also be organized.<sup>46</sup> MEPs may also consult a comprehensive and meaningful record of the proceedings of the Supervisory Board in a secure reading room. Similar procedures apply vis-à-vis the Council: it receives the annual reports, which are

35. Article 26 of the SSM Regulation.

36. G. lo Schiavo, ‘The Single Supervisory Mechanism: Building the new top-down cooperative supervisory governance in Europe’, in F. Fabbrini, E. Hirsch Ballin and H. Somsen (eds.), *What form of government for the European Union and the Eurozone?* (Oxford, Hart, 2015) p. 111–130, 120–121.

37. *Ibid.*, p. 111–130, 121.

38. See more generally on the intertwining: M. Goldmann, 14 *European Constitutional Law Review* (2018), p. 300–301.

39. See more details on this and in comparison to the Monetary Dialogue: D. Fromage and R. Ibrido, ‘The ‘Banking Dialogue’ as a model to improve parliamentary involvement in the Monetary Dialogue?’, 40 *Journal of European Integration* (2018) p. 295–308.

40. Article 20 of the SSM Regulation.

41. Article 21 of the SSM Regulation.

42. Articles 20–29 of the SSM Regulation and Interinstitutional agreement between the EP and the European Central Bank on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism, [2013] OJ L 320/1.

43. European Central Bank, ‘Memorandum of Understanding between the Council of the European Union and the European Central Bank on the cooperation on procedures related to the SSM’, *European Central Bank* (2013), [https://www.ecb.europa.eu/ecb/legal/pdf/mou\\_between\\_eucouncil\\_ecb.pdf](https://www.ecb.europa.eu/ecb/legal/pdf/mou_between_eucouncil_ecb.pdf).

44. Article 26(3) of the SSM Regulation.

45. Article 20 of the SSM Regulation.

46. Article 20(8) of the SSM Regulation.

presented to ‘the euro Group in the presence of representatives from any participating Member State whose currency is not the euro’.<sup>47</sup> It may be heard by the Euro group on the Euro group’s request as well. Like MEPs, the Euro group may put written questions to the ECB.

National parliaments’ powers are more circumscribed as the SSM Regulation does not mention any relation of accountability vis-à-vis the ECB. Article 21 of the SSM Regulation is simply titled ‘National parliaments’. This is in line with the principle – recalled in the introduction – according to which accountability is to be ensured at the same institutional level.

National parliaments, similar to the EP and the Council, receive the SSM annual reports; and they may submit reasoned observations to the ECB. They may also invite the Chair or a member of the Supervisory Board for an exchange of views ‘in relation to the supervision of credit institutions in that Member State together with a representative of the national competent authority’.<sup>48</sup> Furthermore, they ‘may request the ECB to reply in writing to any observations or questions’.<sup>49</sup>

In practice, the ECB’s annual reports on supervisory activities have been presented to the ECON Committee, and two ordinary meetings and two to three ad hoc exchanges of views have, on average, been organized every year between the EP and the ECB thus far.<sup>50</sup> Questions have been regularly submitted by MEPs.<sup>51</sup> The two yearly exchanges between the Euro group and the ECB foreseen by the Memorandum of Understanding were respected and surpassed in 2017. In fact, in 2017, the important crises faced by some banks generally gave rise to a notable increase in the exchanges between the ECB, and the Euro group and the EP respectively.<sup>52</sup>

By contrast, the relationship with national parliaments is, still, scarce. Two exchanges of views per year have been organized involving five parliamentary chambers: the German Bundestag (Finance Committee), the French National Assembly (European Affairs Committee), the Dutch House of Representatives (Finance Committee), the Italian Senate (twice) (Treasury and Finance Committee) and the Slovenian National Assembly.<sup>53</sup> They have also posed two questions – whose answers were published on the ECB’s website – in 2017.<sup>54</sup>

Most of these new instruments have hence been used by the EP and the Council, whereas national parliaments have only timidly resorted to them so far.

47. Article 20(3) of the SSM Regulation.

48. Article 21(3) of the SSM Regulation.

49. Article 21(2) of the SSM Regulation.

50. The ECB Annual Reports on supervisory and the ECON Committee are available at European Parliament, ‘Committees: Economic and Monetary Affairs – Banking Union’, *European Parliament* (2019), <http://www.europarl.europa.eu/committees/en/econ/banking-union.html>.

51. The number of questions rose from 10 in 2014 to 39 in 2016 and 2017. N. Fraccaroli, A. Giovannini and J.-F. Jamet, *ECB Economic Bulletin* No. 5/2018 (2018), p. 57.

52. For more detail on the relationship between EP and ECB so far, see D. Fromage and R. Ibrido, ‘The Banking Union and its accountability dimension in The European Banking Union and the role of law’, G. lo Schiavo (ed.), *The European Banking Union and the role of law* (Edward Elgar, 2019, forthcoming).

53. In addition to this, there were two exchanges of views with the Italian parliament in 2017.

54. European Central Bank, ‘Annual report on supervisory authorities 2017’, *European Central Bank* (2018), <https://www.bankingsupervision.europa.eu/press/publications/annual-report/pdf/ssm.ar2017.-en.pdf?63a120afab30be18171c083089709229>, p. 82.

## *The ECB's participation in the ESRB*

The ECB is extensively involved in the ESRB, which was created in 2010 with a view to monitoring risks to financial stability in the EU.<sup>55</sup> This takes advantage of the fact that 'the European Central Bank (ECB) can make a significant contribution to the effective macro-prudential oversight of the Union's financial system'.<sup>56</sup> The ESRB may issue warnings and recommendations for remedial actions, but it may only monitor the actions taken by the addressee(s) of such recommendation; it may not constrain its (their) actions as its warnings and recommendations are not legally binding, although the 'comply or explain' rule applies.

The ECB's President chairs the ESRB<sup>57</sup> and represents the ESRB externally,<sup>58</sup> and '[t]he first Vice-Chair shall be elected by and from the members of the General Council of the ECB'.<sup>59</sup> The President and the Vice-President of the ECB are members of the General Board with voting rights, alongside the governors of the national central banks, a member of the Commission, the chairpersons of the three European Supervisory agencies,<sup>60</sup> the Chair and the two Vice-Chairs of the Advisory Scientific Committee and the Chair of the Advisory Technical Committee.<sup>61</sup> In addition to this, the secretariat of the ESRB is ensured by the ECB to have 'sufficient human and financial resources'.<sup>62</sup> The ECB also provides analytical, statistical, administrative and logistical support to the ESRB.<sup>63</sup> As the ESRB is a 'body' that does not have any binding powers but shall merely express an opinion; the involvement of the ECB's President and Vice-President is beneficial and contributes to build up the ESRB's reputation; the choice of the ECB as a host institution for the ESRB was guided by the fact that 'the ESRB could benefit from the visibility, independence and strong reputation of the ECB'.<sup>64</sup> However, a need for the ESRB to become more autonomous from the ECB was also identified,<sup>65</sup> highlighting the existing tensions.

Interestingly, the ESRB Regulation contains specific provisions on impartiality. Article 7 of the ESRB Regulation indeed states that

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55. More on the background of this creation: A. Spendzharova, 'Is more "Brussels" the solution? New European Union Member States preferences about the European financial architecture', 50 *Journal of Common Market Studies* (2012), p. 315–334, especially p. 316–318.

56. Recital 7 of the Preamble to Council Regulation No. 1096/2010/EU conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board, [2010] OJ L 331/162 (the ECB-ESRB Regulation).

57. Article 5(1) of Regulation No. 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing an ESRB Regulation, [2010] OJ L 331/1 (the ESRB Regulation). The ESRB Regulation establishes that an evaluation has to be done after the first mandate to evaluate whether the ECB President should remain entrusted with the task to chair the ESRB. This was maintained, after the Commission – upon a consultation with stakeholders – deemed this arrangement to have 'a lot of merits', even if the creation of the figure of Managing Director was also encouraged. European Commission, Report on the mission and organisation of the European Systemic Risk Board (ESRB), COM(2014) 508 final, p. 8.

58. Article 5(8) of the ESRB Regulation.

59. Article 5(2) of the ESRB Regulation.

60. European Banking Authority (EBA), European Insurance and Occupational Pensions Authority (EIOPA) and European Securities and Markets Authority (ESMA).

61. Article 6(1) of the ESRB Regulation.

62. Article 3(1) of the ESRB Regulation.

63. Recital 9 of the Preamble to the ESRB Regulation.

64. European Commission, Report on the mission and organisation of the European Systemic Risk Board (ESRB), COM(2014) 508 final, p. 6.

65. *Ibid.*, p. 12.

[w]hen participating in the activities of the General Board and of the Steering Committee or when conducting any other activity relating to the ESRB, the members of the ESRB shall perform their duties impartially and solely in the interest of the Union as a whole. They shall not seek nor take instructions from the Member States, the Union institutions or any other public or private body. [Furthermore, n]either the Member States, the Union institutions nor any other public or private body shall seek to influence the members of the ESRB in the performance of the tasks set out in Article 3(2).<sup>66</sup>

Some accountability mechanisms of the ESRB vis-à-vis the EP are contained in the ESRB Regulation.<sup>67</sup> The ESRB's Chair shall appear before the EP at least annually 'marking the publication of the ESRB's annual report to the European Parliament and the Council'.<sup>68</sup> The ESRB Regulation acknowledges that the President of the ECB appears before the EP in a similar manner as is the case with the Monetary Dialogue and thus contains some safeguard to ensure these procedures are not combined. It specifically states that '[t]hat hearing shall be conducted separately from the monetary dialogue between the European Parliament and the President of the ECB.'<sup>69</sup> Further to this, EP committees may request the ESRB's Chair (that is the ECB President) to attend hearings.<sup>70</sup> Interestingly, some confidential oral discussions can be arranged between the ESRB's Chair and the Chair and the Vice-Chair of the EP's ECON Committee 'on the ongoing activities of the ESRB' at least twice a year, and more if necessary.<sup>71</sup>

Apart from the one published in June 2014, the annual reports of the ESRB are not very detailed concerning the practice of these instruments; they mention regular hearings and confidential oral discussions, but little data are included. Nevertheless, the publication of the opening speeches of the Chair on the ESRB's website allows us to trace back hearings before the ECON committee. Since becoming the President of the ECB, Mario Draghi has appeared before the ECON committee in this role two to three times a year.<sup>72</sup> According to the 2012 Annual Report, two confidential oral discussions were also organized in May 2011 and in November 2012.<sup>73</sup>

Those hearings are key for MEPs to be able to fulfil their duty of accountability: '[t]he introductory statement of the ESRB Chair is [indeed] an important tool for providing MEPs with regular updates on the ESRB's outlook for systemic risk and with insights into major strands of the ESRB's work.'<sup>74</sup>

The Council, in contrast, receives the ESRB's annual reports<sup>75</sup> and like the EP and the European Commission, it may request the ESRB to examine specific issues,<sup>76</sup> but no further exchanges are formally planned between the Council and the ESRB.

66. Article 7(1) and 7(3) of the ESRB Regulation.

67. Article 19 of the ESRB Regulation.

68. Article 19(1) of the ESRB Regulation.

69. Article 19(1) of the ESRB Regulation.

70. Article 19(4) of the ESRB Regulation.

71. Article 19(5) of the ESRB Regulation.

72. Data extracted from the ESRB website unless indicated otherwise: European Systemic Risk Board, 'Speeches Published in 2017', *ESRB* (2017), <https://www.esrb.europa.eu/news/speeches/date/2017/html/index.en.html>.

73. European Systemic Risk Board, 'Annual Report 2012', *ESRB* (2013), <https://www.esrb.europa.eu/pub/pdf/ar/2013/esrbar2012en.pdf?bdef0ab5b0b82e6b9545fe6284ee6a76>, p. 45. ES. No additional data are available on the confidential oral discussions.

74. European Systemic Risk Board, 'Annual Report 2013', *ESRB* (2014), <https://www.esrb.europa.eu/pub/pdf/ar/2014/esrbar2013en.pdf?7e65b0ab3969160bcea5604bdba12532>, p. 59.

75. Article 19(1) of the ESRB Regulation.

76. Article 19(3) of the ESRB Regulation.

The EP is thus the primary responsible of ensuring the ESRB's accountability, and the ECB President regularly appears in its capacity as ESRB Chair before it.

### *The ECB's relationship to the EBA*

The EBA – an EU agency – was established in 2011 as part of the EFSF. It contributes to ensuring consistent prudential regulation and supervision within the EU by adopting Binding Technical Standards and Guidelines that compose the European Single Rulebook in banking. The Single Rulebook defines a single set of harmonized prudential rules for financial institutions. The ECB is closely involved in the activities of the EBA in its capacity as banking supervisor. Indeed, a representative of the Supervisory Board is a member of the EBA's Board of Supervisors, although it does not have a vote.<sup>77</sup>

This ECB/SSM involvement in the functioning of the EBA, mainly as a member of the Board of Supervisors with no voting rights, does not appear – at first sight – to complicate the ECB's accountability framework. In the functional construction of the BU, the role of the EBA seems to be fairly well described and technical; in fact, the EBA's potential remained so circumscribed that the creation of the BU was deemed necessary only a few years after it was established.<sup>78</sup> The ECB's influence has not been as circumscribed as could have been anticipated in light of its mere role as a member with no voting rights, and this matters in analysing the ECB's accountability standards. SSM representatives do take part in EBA standing committees and working groups, and they can informally try and influence national supervisors' positions. In fact, in the original draft of the SSM Regulation, those positions had to be coordinated;<sup>79</sup> this proposal was not adopted due to British opposition. Should the idea of granting the SSM a right to vote be pursued post Brexit, the difficulty in weighing this Eurozone vote and the need to decide whether it should replace Eurozone Member States votes or not are, however, questions that would first need to be answered.

As an EU agency, the EBA is accountable to the EP, the Council and the European Commission.<sup>80</sup> The EBA shall transmit its work programme and its annual report to those three institutions (the annual report being additionally also forwarded to the European Court of Auditors and the European Economic and Social Committee).<sup>81</sup> The EP also has a right of veto over the Chairperson's nomination,<sup>82</sup> as well as over the Executive Director's nomination.<sup>83</sup>

77. Article 40(1)(d) of Regulation No. 1093/2010/EU of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, [2010] OJ L 331/12 (the EBA Regulation).

78. More on this: G. lo Schiavo, 'The Single Supervisory Mechanism: Building the new top-down cooperative supervisory governance in Europe', in F. Fabbrini, E. Hirsch Ballin and H. Somsen (eds.), *What form of government for the European Union and the Eurozone?* (Hart, 2015) p. 111–130, 114–115.

79. '(...) to reflect the ECB's supervisory responsibilities, representatives from competent authorities from participating Member States shall coordinate and express, for matters falling in the competences of the ECB, a common position'. Explanatory Memorandum, Proposal for a Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, COM(2012) 511 final, Point 4.1.3.

80. It may of course establish relationship to national parliaments too, and its Chairperson appeared before the Italian Senate in July 2017.

81. Article 43(4) and 43(5) of the EBA Regulation respectively.

82. Article 48(2) of the EBA Regulation.

83. Article 51(2) of the EBA Regulation.

Its Chairperson is appearing more regularly before the ECON Committee too,<sup>84</sup> because the EP and the Council ‘may invite the Chairperson or his alternate to make a statement, while fully respecting his independence’.<sup>85</sup> Furthermore, the ‘Chairperson shall report in writing on the main activities of the Authority to the European Parliament when requested and at least 15 days before making [such] statement’.<sup>86</sup> Although the EBA Regulation defines some of the elements that need to be included in such a report, the EP may request additional information on an ad hoc basis.<sup>87</sup>

As an EU agency, the EBA is eventually dependent on the Commission’s approval, hence it is logical that its accountability framework differs from that of the ECB and of the ESRB, although in this framework, it is the EP that is primarily in charge of guaranteeing democratic accountability and the ties between the EP and the EBA are becoming increasingly tight.

## Evaluation

The ECB participates in a variety of institutions and bodies in which it assumes a variety of roles that also differ largely in theory and in practice; the resulting institutional framework is particularly complex. This section does not aim to provide an evaluation of the ECB’s participation in those bodies per se, that is from the point of view of their economic efficiency or desirability. The focus here lays on the impact of creating such a complex framework in terms of democratic accountability.

It first results from the different accountability mechanisms in place that the President of the ECB is regularly led to appear before the EP ECON Committee in their different capacity. For instance, the appearances as Chair of the ESRB and as part of the monetary dialogue are usually held back to back,<sup>88</sup> and some have, in fact, pleaded for the establishment of an ESRB Managing Director to make it easier to distinguish between the ESRB and the ECB.<sup>89</sup> As the Chair of the Supervisory Board is regularly heard by the ECON Committee as well, it may be increasingly difficult for MEPs to identify in which framework they need to ask a particular question to the ECB.

In contrast, because of the intertwining of the different procedures and in particular because of the concentration of powers in the ECB’s President/Executive Board, in relation to a specific decision in supervisory matters, the EP may have to hold to account both the Chair of the Supervisory Board in the framework of the Banking Dialogue and the President of the ECB in the framework of the Monetary dialogue. Beyond this, if the ‘Chinese wall’ between the ECB’s functions as banking supervisor with a responsibility for monetary policy is opaque, contradictory decisions may be taken. It follows that the Governing Council may be led to approve contradictory

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84. EBA, ‘EBA Management speeches’, EBA (2019), [http://www.eba.europa.eu/news-press/calendar?p\\_id=8&tabs1=events&\\_8\\_eventTypes=eba-management-speech](http://www.eba.europa.eu/news-press/calendar?p_id=8&tabs1=events&_8_eventTypes=eba-management-speech) and J-P. Salter, ‘The multiple accountabilities of the European Banking Authority’, *Journal of Economic Policy Reform* (2017), p. 1, 10.

85. Article 50(1) of the EBA Regulation.

86. Article 50(2) of the EBA Regulation.

87. Article 50(3) of the EBA Regulation.

88. European Commission, Report on the mission and organisation of the European Systemic Risk Board (ESRB), COM(2014) 508 final, p. 6.

89. European Commission, Staff Working Document accompanying the Report on the mission and organisation of the European Systemic Risk Board (ESRB), COM (2014) 508 final Commission Staff Working Document Accompanying the document Report To the European Parliament and the Council on the mission and organisation of the European Systemic Risk Board (ESRB), SWD(2014) 260 final, p. 17.

decisions which, in turn, would make any mechanism of accountability particularly difficult to execute.<sup>90</sup> Considering all this, it becomes clear that at the very least the ‘Chinese wall’ should not be totally opaque, that the ECB representative that answers MEPs’ questions should interpret the boundaries between the different functions of the ECB as flexibly as possible, and that if the ECB is to keep both its ‘hats’, joint dialogue sessions may be useful in the future to guarantee adequate accountability. This would avoid parliamentary questions remaining unanswered in the future because they are asked in the wrong forum, as has happened before.

As regards practice so far, the available instruments are regularly used by the EP and by the Council/Euro group where provided. The question can nevertheless be asked whether the institutions in charge of holding the ECB, or the institutions and bodies in which it is involved, to account are truly in a position to do so. In other words, the ECB’s full independence prevents the drawing of any direct consequence, as does the ECB’s full financial independence, hence only political sanctions are left – but is this even a possibility? The ECB’s mandate has become increasingly broad and blurred, and the matters it decides upon ever more technical so it is legitimate to wonder whether MEPs, or MPs, can appropriately assess its actions. This is more difficult when transparency is not fully guaranteed and access to relevant information is not straightforward.<sup>91</sup> Additionally, in the case of the EBA, the ECB’s formal role is limited but in practice, it is key; this results in an accountability gap as no specific mechanisms exist to hold the ECB to account for its actions in that framework.

National parliaments are so far (formally) only involved in the BU, although in practice the ECB (monetary function) has entered in a dialogue with some of them. It is contended here that there is a need to extend this relationship to the monetary function to increase the ECB’s democratic legitimacy, and this should take the form of clearly defined mechanism that could remain informal like the Political Dialogue between the European Commission and national parliaments. Interparliamentary cooperation between the EP and national parliaments could also be useful.<sup>92</sup>

## Conclusion

The increased complexity that results from the ECB’s involvement in a variety of institutions and (informal) bodies arguably makes it increasingly difficult for MEPs and other actors in charge of ensuring democratic accountability to play their role. These difficulties are amplified for the general public, whose trust in the ECB has been steadily decreasing in the past years.<sup>93</sup> It is thus of outmost importance that the existing mechanisms are used to their maximum capacity, and that a simplification and clarification of the institutional framework in place remains a target for future reforms. Independently, the question can legitimately be asked of whether the EP is the right institution to hold the ECB to account in all its capacities; for decisions affecting Eurozone Member States only, perhaps another institutional setting should be developed with Eurozone parliaments’ (collective?) participation. Even if national parliaments can be involved in the

90. M. Goldmann, 14 *European Constitutional Law Review* (2018), p. 301.

91. See M. Bozina Beros, ‘ECB’s accountability within the SSM framework: mind the (transparency) gap’, 26 *Maastricht Journal of European and Comparative Law* (2019), in this special issue.

92. D. Fromage and R. Ibrido, ‘The Banking Union and its accountability dimension’, in G. lo Schiavo (ed.), *The European Banking Union and the role of law* (Edward Elgar, 2019, forthcoming).

93. See C. Koop and C. Reh, ‘Europe’s Bank and Europe’s Citizens: Accountability, Transparency – Legitimacy?’, 26 *Maastricht Journal of European and Comparative Law* (2019), in this special issue.



banking supervision area, they have, so far, established almost no relationship with the ECB; there is thus still a need for closer involvement of national institutions in light of the additional transfer of powers to the EU level and the impact on Member States. The European Commission stated in 2012 that

in multilevel governance systems, accountability should be ensured at that level where the respective executive decision is taken, whilst taking due account of the level where the decision has an impact [...] and] in developing EMU as in European integration generally, the level of democratic legitimacy always needs to remain commensurate with the degree of transfer of sovereignty from Member States to the European level.<sup>94</sup>

One can wonder whether this condition has really been respected.

To answer this question, future research should examine the content of the exchanges between the ECB and the institutions in charge of holding it accountable; it should also distinguish between the different actions the ECB performs within the different mechanisms, as well as consider the relations between national parliaments and national institutions because the absence of a relationship between national parliaments and an EU institution may be compensated for by closer pre-existing ties between them and their respective national institution. This would usefully contribute to the ongoing debate of whether the ECB should be submitted to different standards of accountability and independence in its different capacities.

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94. European Commission, Communication from the Commission, A blueprint for a deep and genuine economic and monetary union, COM(2012) 777 final, p. 2, 35.